IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

Petitioner,

against

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Fidelity and Deposit Company of Maryland, a corporation (hereinafter called the "Surety"), respectively prays that this Court issue a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered December 2, 1943, wherein that court reversed a judgment entered December 24, 1942 by the District Court of the United States for the Northern District of Illinois,

Eastern Division (R. 57, 65), and remanded this cause to said District Court with directions to enter a judgment for respondent, Pinkerton's National Detective Agency, Inc., a corporation (hereinafter called "Pinkerton"). The judgment of the District Court denied the motion of Pinkerton for a summary judgment, allowed the Surety's motion for summary judgment, and held that Pinkerton could not recover from the Surety upon the official bond of Lawrence J. O'Connell, as Chief Security Examiner of the Illinois Industrial Commission, for the alleged conversion by O'Connell of a United States Treasury bond which Pinkerton deposited with said O'Connell in attempting to qualify as a self-insurer under the Illinois Workmen's Compensation Act.

Summary Statement of Matters Involved.

This petition involves the questions:

First. May the Circuit Court of Appeals in a summary judgment proceeding try and decide the contested, material issue of fact as to whether O'Connell received Pinkerton's treasury bond by virtue of his office and thus deprive the surety of its right to a jury trial thereon, or is the Circuit Court of Appeals required, under Rule 56 of the Rules of Civil Procedure, to reverse and remand this cause for trial since a genuine issue as to such fact is present?

Second. Whether the Illinois Industrial Commission lacked power to accept Pinkerton's deposit of collateral, thereby establishing as a matter of law that O'Connell did not act by virtue of his office or employment?

Third. Whether Pinkerton's suit upon O'Connell's official bond is barred by the Illinois Five Year Statute of Limitations and whether the Circuit Court of Appeals is obliged to apply to Pinkerton's suit the rule thereon established by the reviewing courts of Illinois?

Facts.

Between 1933 and September 29, 1941, O'Connell was employed as Chief Security Examiner by the Illinois Industrial Commission (R. 43) and gave bond in the penal sum of $20,000.00, with petitioner as surety thereon, conditioned upon the faithful performance of all duties pertaining to his office as Chief Security Examiner and his accounting for and paying over to parties entitled thereto all property that came into his hands by virtue of his office (R. 6).

August 9, 1935 Pinkerton, in order to qualify as a self-insurer under the Illinois Workmen's Compensation Act, entered into an agreement signed by Pinkerton and signed in the name of the Industrial Commission of Illinois by O'Connell, as Chief Security Examiner (R. 35), and deposited a $10,000 United States Treasury bond (R. 24), which, the agreement provided, was to be returned by the Commission whenever "no payments are due and unpaid from said Pinkerton's National Detective Agency, Inc., to its employees or others under the Compensation law."

Pinkerton's complaint filed July 21, 1942 alleged that O'Connell "during the year 1936" converted said treasury bond to his own use (R. 4) and prayed for judgment for $10,000, plus interest thereon (R. 5).

The surety's answer denies that either O'Connell, as Chief Security Examiner, or the Illinois Industrial Commission ever had any right, power or duty to require of or accept from Pinkerton the deposit of its treasury bond; denies that said treasury bond came into O'Connell's hands by virtue of his office, as Chief Security Examiner, and pleads the five year Statute of Limitations (R. 7-10).

September 21, 1942, pursuant to notice previously given, the surety filed its motion for summary judgment (R. 19). After receipt of the surety's notice, Pinkerton served no-

tice of its own motion for summary judgment and that motion was filed on September 21, 1942 at the time the surety's motion was filed (R. 10).

The surety filed the affidavit of John J. Funk in support of its motion and the affidavit of Peter J. Angsten in support of its motion, and in opposition to Pinkerton's motion. Pinkerton filed the affidavit of J. O. Camden in support of its motion and various letters and documents from a file found in the office of the Industrial Commission. Funk's affidavit states the substance of the documents in the above mentioned file and that an audit, examined by him, shows that of the one thousand Illinois self-insurers, all deposited their collateral with qualified banks and trust companies and that none deposited collateral with the Commission except thirty-four who deposited their collateral with O'Connell, Chief Security Examiner, for the Illinois Industrial Commission, which latter collateral the accountants could not locate. The letters referred to by Funk are the same letters copies of which were subsequently filed and the substance of the letters is (1) demands for and remittance of interest coupons; and (2) demands for and the refusal to return Pinkerton's Treasury bond in July, 1941 (R. 20-24).

The gist of Camden's affidavit is that Pinkerton did deposit its treasury bond with O'Connell, Chief Security Examiner, for the Industrial Commission, on August 9, 1935, at which time the escrow agreement of that date was executed; that on May 24, 1941, Pinkerton insured its compensation liability and had no outstanding liability; that on January 5, 1942, Pinkerton demanded return of its treasury bond and Borah, then Chairman of the Industrial Commission, refused to return or exhibit same; that Pinkerton first discovered the conversion on January 30, 1942, when Borah advised that the treasury bond was missing; and that between March 15, 1937 and January 30, 1942,

O'Connell concealed the fact that he had converted Pinkerton's treasury bond (R. 11-18).

The affidavit of Angsten, Chairman of the Illinois Industrial Commission during the period of O'Connell's employment, states O'Connell's duties were "only to examine the financial statements of employers who applied * * * for self insurance, and * * * if such statements were not satisfactory to the Commission, to inform such employer thereof and * * * of the amount of securities such employer should deposit in the name of a qualified trustee in a qualified bank or trust company of the employer's own selection." Angsten further states that neither he nor any other member of the Commission, to his knowledge, knew of Pinkerton's deposit agreement of August 9, 1935 or of the deposit of its treasury bond and that if such agreement was executed by O'Connell, he did so "without the authority, approval, direction or knowledge of the said Commission, or this affiant, as Chairman thereof, and outside the duties of his said employment" (R. 43-44). Angsten attached to his affidavit a copy of the rules adopted by the Commission (R. 44-56).

Pinkerton filed no affidavit or other evidence purporting to show any specific delegation of duties to O'Connell or to specifically show what his duties were and the record contains no evidence in contradiction to Angsten's affidavit unless the letters and statements of acts justify inferences opposed to Angsten's testimony. In the latter event there would be an issue of fact as to O'Connell's duties.

Jurisdiction of the Court.

The court has jurisdiction under Section 240 of the Judicial Code, as amended (43 Stat. 938).

Questions Presented and Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the trial court with directions to enter a judgment in favor of Pinkerton.

2. In trying and deciding the genuine issue of material fact as to whether O'Connell's acts were by virtue of his office, instead of remanding the cause for a trial upon that issue, in violation of Rule 56 of the Federal Rules of Civil Procedure and in conflict with the decisions of the other Circuit Courts of Appeals.

3. In refusing to hold, as a matter of law, that O'Connell did not act by virtue of his office for the reason that the Industrial Commission lacks power to act as depositary for Pinkerton's collateral.

4. In holding the Illinois five year statute of limitations inapplicable, thereby refusing to follow the doctrine of applicable decisions of Illinois Courts of review.

Reasons for Allowance of the Writ.

We understand this Court may exercise its discretion to grant the writ of certiorari where one Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals, or has decided an important question of local law in conflict with applicable local decisions, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In the case at bar, each of the above elements is present.

The Circuit Court of Appeals has assumed the power of trying and deciding in summary judgment proceedings the

genuine issue of material fact as to whether O'Connell's acts were by virtue of his office or employment, in violation of Rule 56 of the Federal Rules of Civil Procedure and in conflict with decisions of other Circuit Courts of Appeal, which construe Rule 56 to limit a court's power by way of summary judgment proceedings to cases where there is no genuine issue of material fact.

The Circuit Court of Appeals also held the Illinois five year statute of limitations inapplicable in disregard of applicable local decisions.

In trying contested material issues of fact on summary judgment proceedings and thereby depriving the surety of its right to a jury trial and in holding that the cause of action is upon an escrow agreement to which the surety is not a party and upon which Pinkerton does not purport to bring its suit, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court has never given its construction as to the power conferred upon lower courts in summary judgment proceedings by Rule 56, and the question is of sufficient importance to justify the Court in granting the writ.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court for its review and determination on a day certain, to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket as No. 8250, and that said judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court, or, in the alternative, that the judgment of the said United States Circuit Court of Appeals be reversed and it be directed to remand this

cause to the United States District Court for the Northern District of Illinois, Eastern Division, for trial.

Dated: December 24, 1943.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,
Petitioner,

By LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.

BRIEF.

I.

The Circuit Court of Appeals Has Decided Genuine Issues of Material Fact in a Summary Judgment Proceeding Thereby Depriving Petitioner of a Jury Trial in Violation of Rule 56 of the Federal Rules of Civil Procedure and Its Determination of Its Power Under Said Rule Conflicts With All the Decisions of Other Circuit Courts of Appeal and Constitutes Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

In the case at bar there has never been a trial. Both parties filed motions for summary judgment in the trial court (R. 10, 19). That court allowed the motion of the surety and denied that of Pinkerton (R. 65). The appeal was from the summary judgment entered by the trial court in favor of the surety and from the denial of Pinkerton's motion for summary judgment (R. 66). All proceedings have been by way of summary judgment or upon appeal from the judgment entered therein.

Suit is upon the bond of Lawrence J. O'Connell, Chief Security Examiner of the Industrial Commission of Illinois. The bond is conditioned that O'Connell will

> "* * * faithfully perform all the duties pertaining to the office or employment of such Security Examiner * * * and shall faithfully account for and pay over to the parties entitled thereto all monies that shall come into his hands *by virtue of said office or employment.* * * *" (Italics ours.) (R. 5.)

The breach alleged is that, during 1936, "* * * O'Connell, while acting as Chief Security Examiner of the Industrial

Commission of Illinois, * * *," converted plaintiff's treasury bond to his own use (R. 4).

One of the defenses interposed by the surety's answer is that, if O'Connell received and converted the treasury bond, he did not do so by virtue of his office or employment as Chief Security Examiner (R. 8). This defense is predicated upon two independent premises, the determination of either of which in favor of the surety would entitle it to judgment: (1) that the industrial commission is not vested with legal authority to receive deposits of collateral from self-insurers; hence, O'Connell, as its employee, had no such authority; and (2) even if the commission had such authority, it was not a part of O'Connell's duties to receive collateral deposited by Pinkerton or other employers seeking to become self-insurers under the Illinois Workmen's Compensation Act.

Since the industrial commission is created and its duties are prescribed by statute, that portion of the defense based on lack of authority of the industrial commission itself involves a question of law, and, we concede, the Circuit Court of Appeals acted within its power in considering and deciding such legal question.

Even if the industrial commission did have authority to accept and hold collateral deposited by self-insurers, it does not follow that O'Connell had such power or that accepting or holding such collateral was a part of the duties of his office or employment. The office of Chief Security Examiner is not created by statute and the duties of the incumbent are not prescribed by statute but are prescribed by the Illinois Industrial Commission. The duties of O'Connell are to be determined solely from facts, namely, delegations of power to him by the industrial commission and possibly acts of holding out by the industrial commission. This involves wholly a question of fact.

Thus, although the defense asserted could have been determined in favor of the surety upon a pure question of law, it could be determined adversely to the surety only by determining the specific question of fact as to what authority was delegated to O'Connell by the industrial commission, either specifically or by way of holding out.

The Circuit Court of Appeals does not take issue with the surety's contention that it is not liable under its bond for acts of O'Connell which were not done by virtue of his office.[1] That court arrived at its conclusion by determining, as a matter of law, that the commission had authority, and as a matter of fact, that it was within the scope of O'Connell's duties to receive Pinkerton's treasury bond. Thus, the Circuit Court of Appeals has decided the issue of fact as to O'Connell's duties contrary to the decision of the trial court. It did so by weighing inferences, which it drew from circumstances, against the positive direct statement of O'Connell's duties and of his lack of authority contained in the affidavit of the Chairman of the Industrial Commission.

The surety, feeling that there was no possibility of a contention by Pinkerton that the duty of receiving deposits of collateral had been imposed upon O'Connell and that Pinkerton's complaint showed its action was barred by the Illinois five-year statute of limitations, made its motion for summary judgment. Following receipt of notice of the surety's motion, Pinkerton served notice of a similar motion and both motions were filed in court the same day (R. 10, 19). In support of its motion the surety filed the affidavit of Peter J. Angsten, Chairman of the Illinois Industrial Commission during the time involved in this case,

1. The following cases decided by the Supreme Court of Illinois firmly establish such to be the rule:
Orton v. *City of Lincoln*, 156 Ill. 499, 502.
People v. *Tompkins, et al.*, 74 Ill. 482.

wherein Angsten specifically stated that O'Connell's duties were limited to examining financial statements of employers who applied for self-insurance, and if such statements were not satisfactory, to informing such employers of the amount of securities they should deposit with a qualified bank or trust company. Angsten further stated that neither he nor any other member of the commission, to his knowledge, knew of the agreement signed by Pinkerton and O'Connell dated August 9, 1935, or of the deposit of Pinkerton's treasury bond, and that if the agreement was executed by O'Connell, he did so without the authority, approval, direction or knowledge of the commission and outside the duties of his employment (R. 43).

The affidavit is affirmative proof of O'Connell's lack of authority, but it is not all of the evidence that could or would be produced as to such lack of authority upon a trial. Each of the other four members of the industrial commission could likewise testify as to O'Connell's lack of authority and circumstantial evidence could also be produced. The surety did not attempt or purport to produce all of the evidence because under Rule 56 it is necessary to produce only enough legally competent evidence to prove the fact upon which it is contended there is no genuine material issue. If the evidence so produced proves the fact and there is no controverting evidence, the moving party is entitled to summary judgment, if, as a matter of law, such fact has the legal effect contended. If, however, opposing evidence is produced summary judgment proceedings are not applicable regardless of how greatly the evidence in favor of the fact preponderates over the opposing evidence. Hence, it is without purpose to produce more than the quantum of evidence necessary to legally prove the contended fact.

Pinkerton filed the affidavit of J. O. Camden, the scope of which is that the treasury bond was actually deposited

with O'Connell on August 9, 1935, at which time an escrow agreement was signed by Robert A. Pinkerton in the name of Pinkerton and by O'Connell as Chief Security Examiner in the name of the industrial commission. The affidavit further states the treasury bond has not been returned and sets up several demands made by Pinkerton for interest coupons and the return of the treasury bond. The affidavit does not purport to contain any specific statement as to delegations of authority by the industrial commission to O'Connell. At most, it contains statements of acts by O'Connell (R. 11). In addition to the affidavit, Pinkerton submitted various letters (R. 27-40). None of the letters purports to pertain to delegations of authority to O'Connell and the entire scope of the letters is a showing of acts by O'Connell.

Believing that it was immaterial whether O'Connell converted Pinkerton's treasury bond, if he did not do so by virtue of his office, and that Pinkerton had not offered any evidence that actually does or even purports to contradict Angsten's affidavit, the surety proceeded under the theory and the trial court found that there was no issue on the surety's contention of fact that O'Connell did not act by virtue of his office.

If the surety and the trial court are wrong in their position that the affidavit of Angsten is not offset by any evidence and that said affidavit does establish the fact that O'Connell's acts were not by virtue of his employment, the result is merely that the surety was not entitled to a summary judgment. The failure of the surety to establish this fact by the one affidavit, so that there is no genuine issue thereon, does not establish the converse that O'Connell did receive and convert Pinkerton's treasury bond by virtue of his office, so that there is no genuine issue as to that material fact. The most that can be said is that the evidence conflicts as to whether it was a part

of O'Connell's duties to receive Pinkerton's treasury bond.

The Circuit Court of Appeals does not take the position that Pinkerton has proved, without opposing proof, that O'Connell was acting by virtue of his office, or that the affidavit of Angsten was not some legal evidence that he was not so acting. What the Circuit Court of Appeals did was to draw inferences from circumstances; some in the record and some outside of the record,[1] weigh those inferences against the direct affidavit of Angsten, and, from such weighing of conflicting evidence and circumstances, determine as a matter of fact that it was a part of O'Connell's official duties to receive deposits from self-insurers.

This is evident from an examination of the 11th, 12th and 13th paragraphs of the decision of the Circuit Court of Appeals (Appendix pp. 35-37). In Paragraph 11 the court discusses various instances of alleged holding out;[2] in Paragraph 12 it discusses constructive knowledge on the part of the commission that O'Connell was receiving deposits of collateral and the implication of negligence on the part of the commission which would result if Angsten's affidavit were believed (it is novel that a witness' testimony is to be rejected because it convicts him of negligence or even wrongdoing); in Paragraph 13 it considers a letter of July 22, 1941 from a subsequent chairman of the commission as impeaching Angsten's affidavit, because, the Circuit Court of Appeals felt, the letter showed that, at

1. There is no evidence that O'Connell, during his employment, made no effort to conceal the file containing the matter applicable to Pinkerton's deposit, or that said files were properly indexed.

2. It is not logical to conclude that O'Connell was held out as being authorized to receive deposits from the fact that letterheads named him as "Chief Security Examiner". The word "Examiner" contains no implication of the word "depositary".

that time, there was no thought in the mind of the commission that O'Connell had authority to accept the deposit of Pinkerton's collateral. (It is also novel to reject the positive testimony of Angsten because a subsequent chairman had an opinion contrary to Angsten's positive testimony, and the novelty is increased when the subsequent chairman's opinion is inferred from circumstances and is not proved by the affidavit or testimony of the subsequent chairman.)

The fact that O'Connell was using a personally conceived device, outside the scope of his employment in receiving the deposit of Pinkerton's collateral, is evidenced by the fact that, of the one thousand insurers who deposited securities under the Illinois Workmen's Compensation Act, all except thirty-four, whose property it is claimed O'Connell converted, made their deposits with banks as depositaries as required by Rule 39 (R. 24). The fact that he was using such a personally conceived device will be further borne out by an examination of the photostatic copy of the agreement of August 9, 1935, which is included in the original record. In the printed record (R. 14, 25, 35) it would appear as if the name "Ind. Comm. of Ill." is a printed part of the form. This is not the fact. The form was provided and printed for use in connection with deposits of collateral with *banks* by applicants who had existing liability, and blank spaces are provided in the form for writing in the name of the bank which is to act as depositary. The name "Ind. Comm. of Ill." is typewritten in the agreement of August 9, 1935 in the blank space so provided in the printed form for writing in the name of the bank as depositary. The third paragraph of the printed form reads: "* * * it is further agreed between the parties that the said monies, bonds, warrants or any other approved securities shall be surrendered by said *bank* to the said * * *." (Italics ours.)

The word "bank" is stricken by the use of X's and the name "Ind. Comm. of Ill." is inserted by interlineation between the lines above the deleted word "bank". Thus, the form itself shows that it was not prepared for deposits to be made with the industrial commission and that it was contemplated by the commission that deposits of collateral were to be made with a bank as depositary.

Thus, the Circuit Court of Appeals weighed conflicting evidence and adjudicated the issue of fact as to authority delegated to O'Connell in summary judgment proceedings when no effort was made by either party to produce all evidence on the subject in violation of the surety's right to a jury trial (R. 5). Rule 38(d) of Federal Rules of Civil Procedure.

Rule 56(c) of the Federal Rules of Civil Procedure authorizes a court to determine causes under summary judgment procedure only where there is "no genuine issue as to any material fact." It does not authorize any court in a summary judgment proceeding to try an issue of fact. When the Circuit Court of Appeals found that deductions from circumstances furnished evidence in opposition to Angsten's affirmative affidavit, it merely found that there was an issue of fact between the affidavit and the circumstances. Having so found, it was the duty of the Circuit Court of Appeals to remand the cause with instructions to the trial court to have a trial on the issue, wherein all of the evidence on the subject could be produced and considered by a jury.

By its action, the Circuit Court of Appeals has construed Rule 56 to authorize it to decide controverted issues of fact in summary judgment proceedings. In so doing, the Court's exercise of power conflicts with every decision of Circuit Courts of Appeals construing Rule 56 rendered to the present time. The power of courts to determine contested issues of fact in summary judgment proceedings

has been considered by Circuit Courts of Appeals in seven cases since Rule 56 was adopted. Those courts, other than the Circuit Court of Appeals of the Seventh Circuit, have uniformly held that the power of courts to weigh evidence in such proceedings is limited to determining whether there is a genuine issue of material fact, and that, where such issue exists, the court has no power to determine that issue on summary judgment proceedings.

We first cite *Miller* v. *Miller*, 122 F. (2d) 209, because it is similar to the case at bar, in that the opposing evidence was an affidavit on the one side and inferences drawn from facts on the other. Suit was upon an alimony judgment, entered by a Nevada court, which provided that upon plaintiff's remarriage alimony should continue for the support of two children during their minority. The defendant filed an answer alleging, on information and belief, that plaintiff had remarried and on deposition testified that plaintiff had not replied to a letter accusing her of remarrying and that plaintiff had associated with one Carmalt in a manner that indicated marriage. Plaintiff filed an affidavit that she had not remarried, but did not deny failure to reply to the letter for four years or the close association with Carmalt. The court considered the plaintiff's silence and her close association with Carmalt as circumstantial evidence opposed to her positive affidavit and reversed a summary judgment for plaintiff, saying, page 212:

> "We think that this testimony raised a genuine issue as to the material fact of remarriage."

The court construed Rule 56 (c) as follows:

> "Rule 56 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The purpose of this rule 'is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.' However, '*The court is not authorized to try the issue, but is to determine whether there is an issue to be tried.*' '*To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it,* that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force.' " (Italics ours.)

To the same effect are: *McElwain* v. *Wickwire Spencer Steel Co.*, (C. C. A. Second) 126 Fed. (2) 210, 211; *Merchants Indemnity Corporation* v. *Peterson*, (C. C. A. Third) 113 Fed. (2) 4, 6; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (C. C. A. Third) 130 Fed. (2) 1016, 1018; *Whitacre* v. *Coleman*, (C. C. A. Fifth) 115 Fed. (2), 305, 306-7; *Acadian Production Corporation of Louisiana* v. *Land*, (C. C. A. Fifth) 136 Fed. (2) 1, 2-3; *Ramsouer* v. *Midland Valley R. C.*, (C. C. A. Eighth) 135 Fed. (2) 101, 105-6.

II.

The Circuit Court of Appeals Has Deprived the Surety of Its Right to a Trial by Jury of the Issue of Fact as to O'Connell's Authority, in Violation of the Seventh Amendment to the Constitution of the United States.

Pinkerton demanded a jury trial at the time it filed its complaint (R. 5). Under Rule 38 (d) of the Federal Rules of Civil Procedure, this demand inures to the benefit of defendant and may not be withdrawn without the consent of the parties. The amount involved is more than $20.00

and there is a real issue of fact as to O'Connell's authority. We believe it so obvious that the surety has been denied a jury trial in deprivation of its rights under the seventh amendment as to make citation of authorities or arguments mere surplusage.

III.

The Industrial Commission of Illinois Itself Had No Power to Accept or Hold Deposits of Collateral From Applicants Seeking to Become Self-Insurers. Hence, the Receipt of Pinkerton's Deposit Could Not Have Been by Virtue of O'Connell's Office or Employment.

Section 26 (a) of the Illinois Workmen's Compensation Act, (Illinois Revised Statutes 1941, Chap. 48, Par. 163), provides that an employer acting under the Act shall:

> "(1) File with the commission a sworn statement showing his financial ability to pay the compensation provided for in this Act,"
>
> * * *
>
> "If any such employer fails to file such a sworn statement, or if the sworn statement of any such employer does not satisfy the commission, of the financial ability of the employer who has filed it, the commission shall require such employer to,
>
> "(2) Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, or
>
> "(3) Insure his entire liability to pay such compensation in some insurance carrier * * *, or"
>
> "(4) Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act, * * *."

The Industrial Commission adopted Rule 39 for self insurers as follows:

> "Requirements for the Procuring of Self Insurance.
>
> "Application for permission to become a self in-

surer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited *in the name of an approved trustee and in an approved depositary a fund* sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application." (Italics ours.)

No provision is made by the rules for the depositing of collateral other than that contained in Rule 39. It will be noted that the rule limits such deposits to be made "* * * in an approved depositary * * *". If this rule is a complete and exclusive statement of the manner in which collateral is to be deposited by self-insurers, or if it is only a partial statement and applicable to the type of deposit made by Pinkerton, it is apparent that it was beyond the power of the Industrial Commission to receive such deposit and that, as a matter of law, O'Connell did not act by virtue of his office and the surety is not liable for O'Connell's conversion of Pinkerton's treasury bond.

It is axiomatic that a rule adopted by a court or by a quasi-judicial body has the effect of a statute and is binding on and must be followed by the body adopting it, as well as the public, without deviation, in the absence of a reservation of power to make exceptions. (*Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608; *People* v. *Robertson*, 302 Ill. 422, 428.)

The Circuit Court of Appeals avoids the effect of Rule 39 in two ways. It says (1) that the second sentence of Rule 39 limits its application to deposits by self-insurers to secure accrued liability and that the rule is not

applicable to deposits to secure future accruing liability; and (2) that if Rule 39 requires deposits of collateral by all applicants to become self-insurers, it nullifies the provisions of Par. 1 of Section 26(a) of the Illinois Workmen's Compensation Act, which authorizes employers to become self-insurers upon the furnishing of a satisfactory financial statement alone, and that the Industrial Commission could not by rule minimize the rights granted by the statute to employers to become self-insurers.

The reasoning of the Circuit Court of Appeals is fallacious in both respects. The first position taken by the court is based on the fallacious assumption that Pinkerton's deposit was made to secure future liability. Pinkerton did not attempt to prove by affidavit or otherwise, that its treasury bond was deposited as security for *future accruing* liability. The assumption by the Circuit Court of Appeals that the deposit was made for such purpose is not only not based upon any evidence, but is in conflict with the deposit agreement of August 9, 1935, which provides that the treasury bond shall be returned to Pinkerton upon presentation of a certificate "* * * that no payments *are due and unpaid* from the said Pinkerton's Natl. Det. Agency, Inc., to its employees or others under the Compensation Law" (R. 15). It will be noted that the condition upon which the collateral is to be returned does not include the requirement that Pinkerton shall have ceased to act as a self-insurer. The only event necessary to entitle Pinkerton to a return of its collateral is the absence of outstanding liability.

The deposit agreement is the only evidence in the record, direct or circumstantial, which shows the liabilities secured by the deposit and the Circuit Court of Appeals' assumption that the deposit was made to secure future liability is contrary to the agreement and without foundation in evidence.

The fallacy of the reasoning of the Circuit Court of Appeals, that a construction of Rule 39 which would require applicants who seek to become self-insurers to make deposits of collateral with a bank, in the absence of accrued liability, would amount to administrative limitation of the statutory privilege to become self-insurers upon a showing of financial ability alone, is demonstrated by a mere consideration of the statement. If the requiring of collateral from employers having no accrued liability is void as an administrative limitation of the statutory right to act as self-insurer on financial statement alone, that simply means that the Industrial Commission had no power to require the deposit in question from Pinkerton if such deposit was required to secure future liability, as the Court assumes. Thus, if the Court's reasoning is correct, the Industrial Commission had no right to require the deposit in question by Pinkerton and the receipt of such deposit was beyond the scope of the Commission's power. If the deposit was made to secure accrued liability, then the Circuit Court of Appeals concedes Rule 39 is applicable, and it follows that the receipt of the deposit by the Commission was beyond its power, because Rule 39 requires such deposits to be made in an approved depositary in the name of an approved trustee. A further fallacy in the position taken by the Circuit Court of Appeals is that it is based upon the assumption that a rule of the Commission requiring deposits of collateral from self-insurers who have no accrued liability would impair the privilege granted by the Legislature, whereas such a requirement of applicants against whom liability has accrued would not. There is no basis in the statute for distinguishing between applicants who have accrued liability and those who do not. The third fallacy is, having erred in considering the Compensation Act to

justify such distinction, the Court assumed, without basis in evidence, that the deposit in question was made to secure future liability, whereas the only evidence in the record shows that it was made to secure accrued liability.

Pinkerton has argued and may argue here that sub-paragraphs 2 and 4 of Section 26(a), respectively, requiring an employer whose financial statement is not satisfactory to furnish security or authorizing the Industrial Commission to "make some other provision, satisfactory to the industrial commission, * * *" for the securing of compensation payments, vests power in the commission to act as depositary. No measure or standard is provided by the Act for determining the amount, manner, to whom, or terms upon which the security is to be given under sub-paragraph 2. The authority purported to be conferred by sub-paragraph 4 is even more general than the requirement of sub-paragraph 2.

It is the established law of Illinois that a statutory delegation of power to an administrative body which provides no standard or measure of the procedure to be adopted is unconstitutional as an unauthorized delegation of legislative power. In *The People* v. *Federal Surety Co.*, 336 Ill. 472, suit was upon the bond given by a dealer in securities to qualify under the Illinois Securities Law. The defense was that the bond was void and unenforceable because of the unconstitutionality of the statute pursuant to which it was required. That statute provided for the giving of a bond "* * * with terms, conditions and in forms to be approved by the Secretary of State * * *." But no other provision was made as to the terms or conditions of the bond and no provision was made as to the amount to be required, except that a maximum limit was specified. The court held the statute unconstitutional as

an illegal delegation of legislative power, saying at page 480:

> "The requirement of a bond from dealers and brokers in securities is an appropriate means to adopt for the protection of those dealing with them, but the legislature must itself determine what the terms and conditions of the bond must be, and, if classification is intended, must fix the reasonable terms of classification which govern the amount and condition of the bonds. The section is defective in that it does not comply with the constitutional requirements."

As the Circuit Court of Appeals states, there is no Illinois decision squarely in point on the power of the industrial commission to act as depositary of collateral. That question is, however, before the court in *People* v. *O'Connell*, case number 27673, now pending in the Supreme Court of Illinois. O'Connell was convicted on an indictment under Section 80 of the Illinois Criminal Code (Illinois Revised Statutes, 1943, Chap. 38, Par. 214), which pertains only to embezzlement of property in the possession of a public employee by virtue of his office. One of the positions taken by the defendant is that the industrial commission has no power to act as depositary and, consequently, he could not have received the security (under circumstances similar to that in the instant case) by virtue of his office. It is probable that the Supreme Court of Illinois will render its decision in that case during the month of March, 1944.

IV.

In Holding That Pinkerton's Action Is Not Barred by the Illinois Five Year Statute of Limitations, the Decision of the Circuit Court of Appeals Is in Conflict With Every Applicable Decision of the Reviewing Courts of Illinois.

Pinkerton filed its complaint on July 21, 1942 to recover damages for a conversion of its treasury bond alleged to have occurred "during the year 1936" (R. 2). The surety pleaded the Illinois five year Statute of Limitations (R. 9). The Circuit Court of Appeals stated in its opinion that it had some doubt as to the period of limitation applicable to suits on official bonds in Illinois, but held that rule was not involved because:

> "We are inclined to view that the suit is upon a written instrument, namely, the Escrow Agreement entered into *between plaintiff and the Commission*" (Italics ours).
>
> • • • • •
>
> "In our judgment plaintiff's cause of action did not accrue until January 9, 1942 when plaintiff made demand for the return of its property and there was a failure to return it, as required by the contract between plaintiff and the Commission." (Appendix 37.)

We believe it does not require the citation of authority to show that the instant suit is not upon the escrow agreement. The escrow agreement is not pleaded in Pinkerton's complaint, either in substance or in *haec verba*. The surety is not a party to that agreement and Pinkerton does not purport to sue the surety thereon. The suit is upon the official bond executed by the petitioner, as surety for O'Connell, a copy of which bond is attached as Exhibit "A" to the complaint (R. 2, 5). That bond is the only document executed by the surety and the execution

of such bond is the only respect in which the surety participated in any of the acts involved in this suit and any liability on its part must be bottomed solely upon that bond.

The Circuit Court of Appeals does not deny the applicability of the Illinois five year Statute of Limitations (Illinois Revised Statutes, 1941, Chap. 83, Section 16)[1] to suits on bonds of public employes. It says a reading of the Illinois cases leaves the court in some doubt. Instead of resolving its doubt, the court by-passes the question by its erroneous conclusion that the suit is upon the escrow agreement and that Pinkerton's action did not accrue until January 9, 1942, when it demanded return of its property.

The applicability of the five year Statute of Limitations to cases in which a surety is sued upon an official bond is so well established in Illinois that the Circuit Court of Appeals should have had no doubt as to its applicability to this case. The Illinois rule is that the bond does not create the duty or the plaintiff's right, but that the gist of the plaintiff's action is the wrongful act or breach of duty by the official for whom the bond stands merely as security and that the action is barred by the lapse of the period within which an action for the wrongful act is barred.

The rule in Illinois is firmly established by *People for the use of Hammond* v. *Graydon, et al.*, 306 Ill. App. 163, 166-169 (Leave to appeal denied by the Illinois Supreme

1. The section reads: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Court, 306 Ill. App. XXXIII); *People for the use of Stubblefield,* v. *Wochner,* 244 Ill. App. 30, and by *People for the Use of Town of New Trier, etc.* v. *Sanborn Hale,* No. 42657, decided by the First District of the Appellate Court of Illinois on December 13, 1943. In *People for the use of Hammond* v. *Graydon, et al.,* 306 Ill. App. 163, suit was against the sheriff and the surety upon his official bond to recover damages for a wrongful levy which occurred more than five years and less than ten years prior to the filing of the action. The defense was the Illinois Five Year Statute of Limitations. In sustaining this defense, the court reviewed the authorities and held the five year Statute applicable.

The rule is based upon a sound public policy which declines to extend the period of exposure of public officials or their sureties to litigation beyond the ordinary period merely because a bond has been given as collateral security for the officers' wrongful acts. Such rule is not unique or an Illinois anomalism, but is followed in other jurisdictions and is recognized as the weight of authority. (*County of Sonoma* v. *Hall,* 132 Cal. 589; *Commissioners of Graham Co.* v. *Van Slyck,* 52 Kan. 622; *Spokane Co.* v. *Prescott,* 19 Wash. 418; *People* v. *Putnam,* 52 Colo. 517; Ann. Cas. 1913 E. pp. 1264-1266; 22 R. C. L. § 196.)

But even if the Illinois rule were an anomalism the federal courts are bound to follow the Illinois rule (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64), and there should be no hesitation in applying it to the case at bar.

Pinkerton has contended and the Circuit Court of Appeals held that if the five year Statute of Limitations is applicable, the action is not barred because it did not accrue until January 9, 1942, when Pinkerton demanded return of its treasury bond, which was within five years of the filing of suit. This contention is predicated upon the

assumption that Pinkerton's treasury bond was converted by the lawful holder thereof. In *O'Connell* v. *Chicago Park District*, 376 Ill. 550, the court specifically holds that where possession is obtained wrongfully the cause of action accrues at the time possession is obtained and that such cause is the only cause of action arising out of the transaction and that a new cause does not accrue at the time of demand. Applied to the case at bar, if the possession of Pinkerton's bond by the industrial commission was rightfully obtained, a second cause of action accrued in favor of Pinkerton against the industrial commission at the time of Pinkerton's demand for the return of the bond on January 9, 1942. The instant suit is not against the industrial commission or its surety. Pinkerton contends, and the Circuit Court of Appeals' decision is predicated upon the proposition that the treasury bond was deposited with the industrial commission acting through its agent O'Connell and that it was not deposited with O'Connell individually and outside of the scope of his duties. If such is the case, contract relationship, whether express or implied, exists solely between Pinkerton and the industrial commission and no contract relationship exists between Pinkerton and O'Connell. The moment O'Connell took the bond individually, he committed a wrongful act, even under Pinkerton's theory of the case, and this wrongful act constituted a conversion of Pinkerton's bond for which a cause of action accrued against O'Connell and the surety. Since the taking of possession by O'Connell in his individual capacity was a wrongful act, *O'Connell* v. *Chicago Park District*, 376 Ill. 550, above cited, is specific authority that the only cause of action which ever arose is the cause of action for conversion, which arose at the time of the conversion alleged by Pinkerton to have been in 1936, more than five years prior to the institution of suit. The case is also authority for the proposition that no new cause of

action arose at the time O'Connell sold the treasury bond, but this is immaterial in view of the fact that the conversion and disposition of the bond by O'Connell both occurred in 1936, more than five years prior to institution of suit. Thus, it is apparent that the only cause which ever arose against the surety arose at the time of the conversion. It is futile to say that Pinkerton could not have sued the industrial commission until Pinkerton was entitled to the return of its bond from the industrial commission. Regardless of whether Pinkerton could have sued the industrial commission, it could have sued any third party, including O'Connell, which converted the bond from the industrial commission during the time the commission was entitled to hold the bond as depositary under the deposit agreement of August 9, 1935. Surely, if A bails a chattel to B for a specific period of time and C converts the chattel, A has a cause of action against C, notwithstanding the fact that the time during which B is entitled to hold the chattel had not expired. Hence, we submit that Pinkerton and the Circuit Court of Appeals confuse the date when plaintiff's right of action against defendant arose with the date when plaintiff's possible cause of action against the industrial commission arose in their conclusions that the instant suit was filed within five years after the cause of action accrued.

Pinkerton has contended and may contend here that the Statute of Limitations was tolled by reason of fraudulent concealment of the cause of action by O'Connell under the provisions of Section 22 of the Illinois Statute of Limitations (Illinois Revised Statutes, 1941, Chap. 83, Par. 23).[1]

1. The section reads:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

The mere reading of the statute demonstrates that acts of concealment on the part of O'Connell do not toll the statute as against the surety. It is not charged that the surety, which is the only defendant to Count II of Pinkerton's complaint, in any manner concealed the cause of action. The relationship of principal and agent does not exist between O'Connell and the surety, but even if such close relationship did exist, the concealment by O'Connell would not toll the statute as against the surety. (*Wood* v. *Williams*, 142 Ill. 269, 280.)

Conclusion.

There is a genuine issue of fact as to whether O'Connell acted by virtue of his office in receiving Pinkerton's deposit. This issue is material and a judgment cannot be entered in favor of Pinkerton without deciding that issue. Under Rule 56 of the Federal Rules of Civil Procedure no court is empowered to decide that issue on summary judgment proceeding. Not only is such power lacking under the rule, but the Seventh Amendment to the Constitution guarantees the surety a jury trial. The exercise of power by the Circuit Court of Appeals conflicts with the decisions of the other circuits, violates Rule 56 and deprives the surety of its constitutional rights. In addition, the Circuit Court of Appeals has decided the question as to the applicability of the five year Statute of Limitations in conflict with the applicable local decision, and for the above reasons this court is justified in exercising its supervisory power and granting the writ of certiorari.

Respectfully submitted,

LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.

APPENDIX.

DECISION OF CIRCUIT COURT OF APPEALS.

October 25, 1943.

Before SPARKS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* The defendant on the first day of September, 1935, executed its surety bond, conditioned upon the faithful performance by Lawrence J. O'Connell of his duties as Chief Security Examiner of the Industrial Commission of the State of Illinois (hereinafter referred to as the Commission), a body charged with the administration of the Illinois Workmen's Compensation Act. Plaintiff was an employer subject to the provisions of such Act, and on August 9, 1935, for the purpose of qualifying as a self-insurer, entered into an Escrow Agreement with the Commission, acting by and through O'Connell, and deposited with the Commission a $10,000.00 United States Treasury Bond to be held by it as a guarantee for the payment of any awards entered against plaintiff under such Act. This arrangement continued from the date of the Escrow Agreement until May 24, 1941, when plaintiff furnished the Commission an insurance policy in lieu of the aforesaid deposit. Thereupon a request was made for the return of the $10,000.00 United States Treasury Bond, and on January 30, 1942 plaintiff was informed by the Commission that such bond was missing. It later developed that the bond had been converted by O'Connell to his own use and has not been returned or made good to the plaintiff.

Both plaintiff and defendant filed motion for summary judgment and the cause was submitted to the court on the pleadings, stipulation of facts and briefs. The court granted defendant's motion for summary judgment in its favor and entered judgment, from whence this appeal comes.

The contested issues may be briefly stated as (1) did the Commission have authority to accept and hold plaintiff's property as security for the payment of compensation provided by the Act? and (2) even so, did O'Connell as Chief Security Examiner of the Commission act in an official capacity in accepting such deposit? Plaintiff argues that both questions must be answered in the affirmative, while the defendant argues to the contrary. In addition, the defendant relies upon the statute of limitation as precluding plaintiff's right to recovery.

The question of the Commission's authority necessarily depends upon a construction of the pertinent provisions of the Act. Sec. 26 (Ill. Rev. Stats. 1941, Ch. 48, Par. 163) imposes upon an employer subject to the Act the duty to furnish, and upon the Commission the duty to require, assurance of the employer's financial ability to meet any awards of compensation which may be made to its employees. Par. (a)(1) provides: "File with the commission a sworn statement showing his financial ability to pay the compensation provided for in this Act * * *." Then follows in the same paragraph this provision: "If any such employer fails to file such a sworn statement, or if the sworn statement of any such employer does not satisfy the commission of the financial ability of the employer who has filed it, the commission shall require such employer to, (2) Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act." Par. (3) authorizes the employer to insure his entire liability to pay compensation in certain authorized insurance carriers. (This paragraph is not involved in this suit.) Par. (4) provides: "Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act."

Sec. 16 of the Act (Ill. Rev. Stats. 1941, Par. 153) authorizes the Commission, among other things, to "make and publish rules and orders for carrying out the duties imposed upon it by law * * * and the process and procedure before the board shall be as simple and summary as reasonably may be." The sole rule promulgated by the

Commission pertinent to the instant inquiry is rule 39, as follows:

> "Application for permission to become a self-insurer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self-insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application."

It is the position of the defendant that the legislature has neither specified the manner by which an employer is to furnish security nor to whom, and that it has conferred upon the Commission the authority to prescribe such specification by rule. Further, the defendant contends that the Commission having by rule 39 prescribed a certain way, the security cannot be deposited in any other way. On the other hand, it is the position of the plaintiff that the legislature clearly conferred such authority upon the Commission and that rule 39 by its express terms is not applicable to the instant situation.

The question presented has not been decided by an Illinois court. Numerous Illinois authorities are cited, largely on rules of statutory construction, which we find of little benefit. We shall refer to one of such rules for the reason that the court below, in a carefully prepared opinion, appears to have attached considerable weight to its pertinency. The substance of the rule, as stated in *People* v. *Wiersema*, 361 Ill. 75, 85, is that the expression of one thing or one mode of action in a statutory enactment excludes any other, even though there be no negative words prohibiting it. Predicated upon this rule of construction, it is urged that rule 39, which it is claimed provided the sole method of furnishing security, excludes all other methods. In the Wiersema case and all others which we have examined, the rule was applied solely to a statu-

tory enactment. In no case, so far as we know, has the expression of one mode of action by rule been held to exclude some other mode of action provided by statute. It is our view that this rule of construction so heavily relied upon is without application.

We have read and reread the statutory language involved and we think it clearly confers upon the Commission the authority to accept from an employer security for the purpose of assuring the discharge of his liability. It is insisted that if the legislature had so intended it would, after the word "furnish," have inserted the words "to the Commission." True, that would have removed all doubt, but we do not think it was necessary. Par. (2) must be read in connection with the other paragraphs of the section. Par. (1) provides for the filing with the Commission of a statement of financial ability. If the Commission is not satisfied with that statement, it shall require the employer to furnish security, etc. Par. (5) authorizes the Commission to demand the filing with it of evidence of compliance with this section. Par. (5)(b) provides that the statement of financial ability or security, indemnity or bond or amount of insurance shall be subject to the approval of the Commission. If it was the intention of the legislature to limit the authority of the Commission solely to an approved depository, it is just as reasonable, and more so in our view, that it would have so declared. Not only was the Commission authorized to accept (1) a financial statement, (2) security, etc., (3) a policy of insurance, but it was authorized (4) to "make some other provision satisfactory to it for the securing of the payment of compensation."

This brings us to a consideration of rule 39 (heretofore quoted), so heavily relied upon by the defendant. It is the position of the defendant that this rule provides the sole and exclusive manner by which an employer may become a self-insurer, that is, by depositing a fund in an approved depository. In the first place, we do not think the rule is capable of such construction. This rule contains two sentences, and it is the second upon which defendant relies. It expressly provides that the fund deposited shall be "sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that

have become final on the date of such application." Surely this plain, unambiguous language can have no application to an employer who has no liability by reason of awards which have become final. Defendant's interpretation of the rule renders meaningless the first sentence, which, in conformity with Par. (1) of the statute, provides for a financial statement satisfactory to the Commission. While defendant admits that this rule is procedural, it also argues that it is jurisdictional. It must be a novel theory that an administrative agency can by its own rules determine its jurisdiction. We are of the opinion that the jurisdiction of an administrative agency, like that of a court, is determined solely by its creator.

Furthermore, the construction of this rule sought by the defendant would present a serious challenge to its validity. It would nullify at least some provisions of the statute. If the sole manner of complying with the Act is by placing funds in a depository approved by the Commission, what becomes of Par. (1) authorizing the employer to comply by furnishing a financial statement? Of course, it may be argued that the acceptance of such a statement is discretionary with the Commission, but this would not justify the Commission in arbitrarily or capriciously refusing to permit compliance in such manner. The Commission no doubt is powerless to exceed the authority which the legislature has conferred, but on the other hand we do not think it can minimize such authority by rule, and certainly not when such rule is in contravention of the statute.

This brings us to the question of O'Connell's authority to act for the Commission. Of course, if the Commission had no authority to accept plaintiff's deposit, O'Connell was likewise without authority. Having held that the Commission had the authority, we think there is little room to doubt but that O'Connell was acting in his official capacity. The record discloses in numerous ways that he was held out to the public as the agent and representative of the Commission. The letterheads and stationery of the Commission contained the names of the Governor of the State, the members of the Commission and "Lawrence J. O'Connell, Chief Security Examiner." All the

correspondence and the Escrow Agreement pertaining to the instant matter were kept in the files of the Commission, properly numbered and indexed. The same is true of some thirty other cases wherein O'Connell accepted deposits on behalf of the Commission.

The defendant attached to its motion for summary judgment an affidavit made by a former chairman of the Commission that O'Connell's authority was limited to an examination of financial ratings of employers who applied to the Commission for self-insurance and to inform them of the amount of securities which should be deposited in the name of a qualified trustee or bank, and that the affiant had no knowledge of any instance where the Commission either acted or assumed to act as a qualified depositary. The fact that this former chairman had no knowledge of what was transpiring in the Commission's office does not alter the law which fixed its authority or the fact that O'Connell was acting on its behalf. No effort was made by the latter to conceal the file containing the matter applicable to plaintiff's deposit. It must be held, we think, that the Commission at least had constructive knowledge of O'Connell's acts and that by the exercise of any kind of diligence would have had actual knowledge. If defendant's position be accepted, it means that plaintiff, from August 9, 1935 (the date of its deposit) until May 24, 1941 (when it furnished an insurance policy), was operating without compliance with the Act. We cannot believe and will not impute to the Commission a degree of negligence which permitted such a situation to exist.

Furthermore, plaintiff, in response to its request for return of its bond, received a letter from the Commission dated July 22, 1941, signed by the chairman of the Commission, advising that it was a rule of the Commission that collateral be held one year from the effective date of the insurance policy, as employees had a right to file a claim during that period of time, and that "if on May 24, 1942, there are no claims, awards or judgments of this Commission, against the Pinkerton's National Detective Agency, your collateral will be released." At that time there evidently was no thought in the mind of the chairman but that the Commission had authority to accept

the deposit or that O'Connell had acted outside the scope of his employment.

We are also of the view that there is no merit in defendant's contention that the action is barred by the statute of limitations. The suit was brought July 21, 1942, and it is argued that the action accrued early in 1936 at the time subsequently admitted by O'Connell as being the time when he converted plaintiff's bond to his own use. On this premise it is argued that the Illinois 5-year statute of limitation (Ill. Rev. Stats., Ch. 83, Sec. 16), applicable to action on unwritten contracts, etc., is controlling. Plaintiff disputes this contention and claims that the action is on a written contract and therefore comes within the 10-year statute of limitation (Ill. Rev. Stats. 1941, Ch. 83, Par. 17). A reading of the Illinois authorities leaves us in some doubt as to which contention should prevail, although we are inclined to the view that the suit is upon a written instrument, namely, the Escrow Agreement entered into between plaintiff and the Commission.

However, even though the 5-year limitation provision be otherwise applicable, it is not here controlling. This is so for the reason that the action did not accrue at the time O'Connell converted plaintiff's property, as the latter had no knowledge of such conversion until long afterward. In our judgment, plaintiff's cause of action did not accrue until January 9, 1942, when plaintiff made demand for the return of its property and there was a failure to return it, as required by the contract between plaintiff and the Commission. Plaintiff had no right to the return of its property until it had furnished other means for the protection of its employees, in compliance with Sec. 26 of the Act. When that was done, plaintiff made a demand for such return, and it was only upon the Commission's refusal that plaintiff was entitled to bring suit. *Selleck* v. *Selleck, et al.*, 107 Ill. 389.

Holding as we do that the Commission had the authority and that O'Connell was acting within the scope of his employment in accepting on behalf of the Commission plaintiff's United States Treasury Bond, it follows that defendant is liable on its bond in suit. The cause is, therefore, reversed and remanded, with directions that a judgment be entered in behalf of the plaintiff.

DECISION OF DISTRICT COURT.

SULLIVAN, *District Judge.*

December 23, 1942.

This is a suit to recover damages for the loss of a Ten Thousand Dollar United States Treasury bond, together with attached interest coupons, which plaintiff alleges it owned on August 9th, 1935, and on that day deposited, with its attached coupons, with Lawrence J. O'Connell, Chief Security Examiner for the Illinois Industrial Commission, in order to qualify as a self-insurer under Section 26 of the Workmen's Compensation Act. The complaint also alleges that some time during 1936 the Chief Security Examiner appropriated said bond to his own use by pledging it as collateral for Ten Thousand Dollar personal loan made to him by Dave Bosley, Al Goldberg and I. L. Goldman, doing business as Associated House Wreckers, named as defendants in Count One of the complaint.

Fidelity and Deposit Company of Maryland, surety on the Chief Examiner's bond, dated September 1st, 1935, and executed to the Industrial Commission, is made sole defendant in Count Two of the complaint.

All defendants have filed their answers denying the material allegations of the complaint.

On September 21st, 1942, under Rule 56(b) the Fidelity and Deposit Company of Maryland filed its motion asking for summary judgment under Count Two of the complaint. Plaintiff, on the same date, also filed a motion asking for summary judgment in its favor under the same count. The case is submitted to the court on the pleadings, a stipulation of facts, and briefs filed on behalf of the Pinkerton Detective Agency and the Fidelity and Deposit Company of Maryland.

Plaintiff contends that having subsequently provided other protection for its employees as a self-insurer, which protection was approved as satisfactory by the Commission, it was then entitled to the return of its United States Treasury bond previously deposited with the Commission

for the purpose of qualifying as such self-insurer; and that upon failure and refusal of O'Connell, Chief Security Examiner, to account to plaintiff for said Treasury bond a cause of action arose in its favor against the surety on the Chief Security Examiner, to account to plaintiff for same, a cause of action arose in its favor against the surety on the Chief Security Examiner's official bond.

The Fidelity and Deposit Company in its motion sets out that deposit by plaintiff of the United States Treasury bond with the Chief Security Examiner was beyond the terms and intent of the Workmen's Compensation Act; that securing such deposit was a usurpation by the Chief Security Examiner of a power which the Commission itself did not possess, and that such action was therefore clearly null and void. That defendant Fidelity and Deposit Company, as surety on the Chief Security Examiner's bond, did not become liable to plaintiff as a result of such deposit, and that plaintiff's cause of action is against O'Connell personally.

The first question for the court to determine is whether the Industrial Commission had the power to act as trustee or depositary for securities when an employer sought to become a self-insurer under Section 26 of the Illinois Workmen's Compensation Act (Illinois Stat. 1941, Ch. par. 163).

Section 26, imposing upon the Commission the duty of obtaining from all employers under the Act assurance of their financial ability to pay compensation, requires:

1. That every employer shall file with the Commission a sworn statement of his financial ability to pay the compensation.

2. That if the employer fails to file such statement, or, if filed, it does not satisfy the Commission of the financial ability of the employer, the Commission shall require the employer to furnish security, or indemnity, or a bond, guaranteeing the payment by the employer of the compensation provided for in this Act.

3. That the Commission may require the employer to insure his entire ability to pay such compensation in an authorized insurance company.

4. That the Commission may require the employer to make some other provision satisfactory to the Commission for securing the payment of compensation.

5. That the Commission may require the employer to file with the Commission from time to time evidence of its compliance with this section.

(b) The sworn statement or security or indemnity or bond shall be subject to the approval of the Commission, upon which approval the Commission will send the employer written notice of its approval. The certificate of compliance with the aforesaid requirement to furnish security or indemnity or bond shall be delivered by the insurance carrier to the Commission within five days.

(c) Whenever the Commission shall find the insurance company to be insolvent or that the insurance company practices a policy of unfairness in the settlement of compensation awards, the Commission may order the company to discontinue business in the state.

(d) If the employer shall fail or neglect to comply with the provisions with respect to sworn statement or security or indemnity or bond, he shall be deemed guilty of a misdemeanor and punishable by fine of not more than $100. nor more than $500. for every day of such delinquency.

Plaintiff insists that Section 26 of the Act gives to the Commission as broad powers with respect to accepting deposits as it is possible by language to confer, and in support of this quotes the portions of Sub-paragraphs 2 and 4 which provide:

(2) "Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, * * * or

(4) "Make some other provision, satisfactory to the Industrial Commission, for the securing of the payment of compensation provided for in this Act, * * *."

I do not agree with plaintiff that the above language clearly grants power to the Commission either to require or to receive deposits of securities *with it*, such as was made in the instant case. Had the Legislature intended that the Commission should be given power under the Act to serve as a trustee or depositary, I believe it would have set out in plain and certain terms the manner in which it was to be done, in order that there would be no doubt concerning the power of the Commission to so act. The Legislature would also have provided in the same certain terms the manner in which self-insurers might deposit their securities, and be protected by the Commission while such securities were on deposit with it. The Legislature would not have left it for the courts to assume that by the use of the phrase "the Commission shall require such employer to furnish security, indemnity, or a bond guaranteeing the payment by the employer of the compensation," it intended thereby to authorize the Commission to act as a depositary or trustee. Or that the use of the phrase "make some other provision satisfactory to the Industrial Commission" gave the Commission power to make any sort of arrangement it saw fit with self-insurers, provided only that it was a satisfactory arrangement to the Commission. And finally on the question of the large amount of securities of which the Commission would constantly be the custodian, the Legislature would surely have provided for some other method of protection to self-insurers, other than the fidelity bond of one employee who served as a security examiner, and who furnished a bond in the sum of $20,000 conditioned upon the faithful performance of his duties as an employee of the Commission.

The Commission itself never seems to have considered that the Workmen's Compensation Act empowered it to act as a depositary or trustee in the case of self-insurers. No instances are shown where it ever did so act, except the thirty-four cases in which O'Connell secured the deposit of securities which he allegedly misappropriated. O'Connell as an employee of the Commission possessed no greater power than what the Commission itself possessed. The Industrial Commission is one of the divisions of the Illinois Department of Labor, and all of the powers conferred upon it by the Compensation Act are conferred on it as a com-

mission, the individual members having no powers which are independent of the commission.

Section 16 of the Act provides for the making of rules by the Commission, and effective July 1st, 1914, the Commission adopted Rule 39, which sets out the requirements for the procuring of self-insurance, and reads as follows:

> "Application for permission to become a self-insurer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self-insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application."

This rule requires that employers seeking to become self-insurers shall deposit in the name of an approved trustee, and in an approved depositary, a fund sufficient to discharge all liability which it may have incurred by reason of awards for compensation, and is the only reference, either in the Act or in the rules, to the manner in which such a deposit shall be made. By analogy I believe this governs the method of furnishing or depositing all securities by self-insurers, where no specific method is set out in the Act. In *People* v. *Robertson*, 302 Ill. 422, a case which involved the rules of the State Department of Health, the court said:

> "When these departments or boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws have the force and effect of law and are often said to be in force by authority of the state. *Blue* v. *Beach*, 155 Ind. 121."

In *Rio Grande Irrigation Company* v. *Gildersleeve*, 174 U. S. 603, the court quoted with approval the following from *Thompson* v. *Hatch*, 3 Pick. 512:

> "A rule of the court thus authorized and made has the force of law, and is binding upon the court as well

> as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. * * * The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualifications must be applied to all cases which come within it, until it is repealed by the authority which made it."

I believe that paragraph 2 of Section 26, providing that the employer "shall furnish security, indemnity or a bond" must be read in conjunction with Rule 39, which provides the only way in which security shall be furnished or deposited. In *People* v. *Wiersema State Bank*, 361 Ill. 75, the court said:

> "The rule that the expression of one thing or one mode of action in an enactment excludes any other, even though there be no negative words prohibiting it, has been settled law of this state since 1852. *Vestal Co.* v. *Robertson*, 277 id. 425."

In the case of *Vestal Co.* v. *Robertson, supra,* the court said:

> "The doctrine was also announced and approved in the case of *Diversey* v. *Smith*, 103 Ill. 378, that an affirmative statute introductive of a new law which directs a thing to be done in a certain manner, means that such thing shall not be done in any other manner, even though there be no negative words prohibiting it."

No cases have been called to my attention which construe paragraphs 2 and 4 of Section 26 of the Workmen's Compensation Act, and my own independent search have revealed none. However, after a careful study and analysis of the Act, I am of the opinion that the Legislature has nowhere therein conferred any power on the Industrial Commission to act as a trustee or depositary of securities belonging to employers seeking to qualify as self-insurers under the Workmen's Compensation Act. Under the principles announced in the above cases, I believe that Rule 39 prescribes the only manner in which any such deposit of securities shall be made, and plaintiff was of course chargeable with notice of the existence of Rule 39. *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554.

Lawrence J. O'Connell's bond, upon which plaintiff brings this suit, contains the following conditions:

> "Now if the said Lawrence J. O'Connell shall faithfully perform all the duties pertaining to the office or employment of such Chief Security Examiner, Industrial Commission, Department of Labor, and shall faithfully account for and pay over to the parties entitled thereto, all moneys that shall come into his hands by virtue of said office or employment, and shall account to and turn over to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers, and all other property appertaining to his office or employment, whole, safe and undefaced, that shall come into his hands by virtue of said office or employment, this obligation to be void; otherwise to remain in full force and effect."

Plaintiff urges that the bond is termed an official bond, and therefore under it Lawrence J. O'Connell was obliged to account to third parties for all moneys coming into his hands "by virtue of said office or employment." Also that the bond afforded protection to the third parties who deposited securities with the Commission because it provided that O'Connell "shall faithfully account for and pay over to the parties entitled thereto all moneys that shall come into his hands."

O'Connell had no duty pertaining to his office or employment which required him to accept or hold plaintiff's United States Treasury bond as a surety or depositary, either on his own behalf or on behalf of the Industrial Commission. Plaintiff's security not having come into O'Connell's hands by virtue of his office or employment, I am of the opinion that his failure to return the same constituted no breach of his official bond. The rule is stated in Corpus Juris, page 1068, as follows:

> "Liability upon an official bond arises as a rule only with reference to acts of the officers which pertain to some function or duty which the law imposes on his office. Thus sureties are not liable for a personal act of an officer not done as a part of, or in connection with his official duties; and where he acts without any proc-

ess and without the authority of his office, or under a process void on its face, in doing such act he is not to be considered as an officer but a personal trespasser. The sureties upon an official bond are, however, liable for an abuse of the authority vested in the principal; and where an officer acts under lawful process, his sureties will be liable for injuries resulting from his negligence or wilfulness in the execution thereof."

In Meachem on Public Officers, section 283, it is said:

"So the liability of the sureties is to be limited to the official acts of the principal only, and is by no means an undertaking against every act that he may chance to commit. As is said in a leading case, 'the sureties do not bind themselves to protect the public against every act of the principal, nor do they become his sureties to keep the peace.' So it is said 'It is an official act, a failure to perform an official duty, or perform it in an improper manner, which comes within the scope of the surety's undertaking.' And again, 'For acts not within the line of official duty and authority, nor under color of office, (the officer) may incur personal, not official, responsibility; and in that personal responsibility, the sureties on his official bond are not involved."

In *Howard* v. *United States,* 97 Fed. (2) 243 (C. C. A. 7th), the court said:

"Contracts of sureties on official bonds are *strictissimi juris.* The instrument is required by statute, which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can only be determined from the bond and from the statutes creating the office and defining the terms of the bond. See *Low* v. *City of Guthrie,* 4 Okla. 287, 44 P. 198."

59 A. L. R. page 81, states the rule thus:

"There is ample authority in support of the rule that sureties on the official bond of a clerk of court are not liable for a loss resulting from the clerk's default with regard to money paid into his hands by virtue of his office, where such money is received by the clerk illegally or without the proper authority."

I find nothing in the language of the employee's bond which leads me to believe that the Fidelity & Deposit Company of Maryland in furnishing the bond of a single employee of the Commission intended also to cover all amounts which might be deposited with the Commission by self-insurers. Any amount so deposited would of necessity fluctuate, according to the number of self-insurers who deposited securities and the amount required in each individual case. For instance, in the thirty-four cases where deposits were made with the Chief Security Examiner by self-insurers, the instant case being one of them, the securities so deposited had a value of hundreds of thousands of dollars, all of which was allegedly misappropriated.

Holding, as I do, that the Commission had no power to act as a trustee or depositary, it follows that O'Connell had no greater power than what the Commission itself possessed, and therefore the securities in question did not come into his hands by virtue of his office.

Defendant's motion for summary judgment in its favor as to all relief asked against it in Count Two of the complaint, is granted, with costs.

(30)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

Petitioner,

vs.

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., A CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GUY A. GLADSON,
DOUGLAS C. MOIR,
WILLIAM C. MULLIGAN,
Attorneys for Respondent.

WINSTON, STRAWN & SHAW,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

Respondent files this brief in opposition to the Petition of Fidelity and Deposit Company of Maryland for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and intends to answer all of the assigned errors specified therein.

Factual Statement.

At the outset we desire to supply certain deficiencies in, and correct certain unfounded inferences from, Petitioner's statement of the facts.

The Escrow Agreement entered into between Respondent and the Illinois Industrial Commission, contrary to the inference sought to be raised by Petitioner, provided that the Treasury Bond deposited by Respondent in order to qualify as a self-insurer under the Illinois Workmen's Compensation Law was to be held by the Commission "as a guarantee for the payment of any judgments entered against the said [Respondent] for the payment of any sums found by process of law to be due to the employees of the said [Respondent] under a law of the State of Illinois, known as the Workmen's Compensation Law * * *," and that said Treasury Bond was to be held until Respondent should request its return and establish by certificate of the Commission that no such payments were due and unpaid (R. 35-36).

During the period from August 9, 1935, until May 24, 1941, Petitioner remained and was accepted as a self-insurer upon the basis of the aforesaid deposit (R. 11, 17). On May 24, 1941, it secured an appropriate compensation insurance policy and filed evidence thereof with the Industrial Commission (R. 11, 17). This insurance was obtained to take the place of the aforesaid deposit in escrow.

Thereupon, Petitioner requested the return of the Treasury Bond deposited as aforesaid and, on July 22, 1941, was informed by the Chairman of the Commission that it was a rule of the Commission that collateral was to be held one year from the effective date of the insurance policy since injured employees could file claims within that period,

and that the collateral would be released to Respondent on May 24, 1942, if at that time there were no claims, awards or judgments of the Commission against Respondent (R. 17).

Petitioner made several demands for the return of said Treasury Bond, which were refused (R. 12), and on or about January 30, 1942, was first informed by representatives of the Commission that said Treasury Bond was missing (R. 12). On March 5, 1942, Petitioner was informed by L. J. O'Connell, Chief Security Examiner of the Commission, that in the early part of 1937 he had pledged said Bond for a personal loan in the amount of $2,000, that said loan was later increased to $10,000, and that subsequently said Bond was sold by the pledgee and the balance of the proceeds remitted to O'Connell (R. 12-13).

ARGUMENT.

I.

No Genuine Issue as to a Material Fact Was Presented by the Motions for Summary Judgment or Decided by the Circuit Court of Appeals.

Petitioner places primary reliance for the granting of the writ of certiorari in the assertion that the Circuit Court of Appeals, in contravention of Rule 56 of the Federal Rules of Civil Procedure, has decided a genuine issue of material fact. This attack is aimed at the holding of that Court that the acceptance of the deposit of security made by Respondent to guarantee the payment of compensation awards which might be entered against it was within the scope of the official duties and powers of the Chief Security Examiner of the Illinois Industrial Commission.

To prevent possible confusion in the minds of the members of the Court, and to explain the division and arrangement of this brief, we point out that Petitioner presents two arguments in connection with the official duties and powers of L. J. O'Connell as such Chief Security Examiner. It is asserted that he acted without authority in accepting the deposit of security from Respondent because (a) the Industrial Commission had no power in law to accept such deposits of security or to require that they be made with the Commission itself, and (b) assuming that the Commission had such power, "it was not a part of O'Connell's duties to receive collateral deposited by Pinkerton or other employers seeking to become self-insurers * * *" (Br. 10).

The first of said questions is conceded by Petitioner to be a question of law, within the power of the Circuit Court of Appeals to decide (Br. 10), and it is answered under

the second subdivision of this brief (ante, p. 10). It is the second of the aforesaid contentions that Petitioner claims is a question of fact, which is material and as to which a genuine issue exists. This we deny.

(a) The definition of the duties of the Chief Security Examiner of the Illinois Commission is a question of law.

The duties of the Chief Security Examiner have been officially described and classified by the Illinois State Civil Service Commission. That body was created by statute and charged with the duty to "classify all the officers and places of employment in the State service, except as provided in Section 11 of this act, with reference to the duties thereof, for the purpose of establishing grades and for the purpose of fixing and maintaining standards of examinations hereinafter provided for." (Section 3 of State Civil Service Act, prior to amendment of June 30, 1943 Illinois Revised Statutes, 1942, Ch. 24½, Par. 3.) It also has the power to make and publish rules (Sections 4 and 5, Illinois Revised Statutes, 1943, Ch. 24½, Pars. 6 and 7). Pursuant to the aforesaid duty and authority, said Civil Service Commission, in an Examination Notice, Volume 1938, Series 2, Paragraph 39, defined the duties of the Chief Security Examiner of the Industrial Commission as follows:

> "DUTIES: Under the supervision of the Secretary and Chairman of the Industrial Commission, to receive, examine, and determine the adequacy of all securities deposited with the Industrial Commission under the provisions of the Workmen's Compensation Law; to supervise examiners and clerical force, and to perform other duties as assigned. Examples: To receive securities furnished by employers who may elect to carry their own risks under the Workmen's Compensation Law; to make investigations of the value of such securities and determine whether they are adequate to the risks involved; * * * to have charge of all securities assigned to his care; * * *."

We submit that, upon the basis of the foregoing, the Circuit Court of Appeals could hold, *as a matter of law*, that the receipt of Respondent's security was within the scope of the authority and official duties of said Chief Security Examiner.

(b) If such definition were a question of fact, the fact is not material.

If we assume, for argument, that the determination of the duties and authority of said Chief Security Examiner presented a question of fact, Petitioner's position is no stronger. The precise extent of that officer's authority or the exact delineation of his duties is not material to the determination of the rights of the parties. He accepted the deposit of Respondent's Treasury Bond under color of, and by virtue of, his office. That is sufficient to impose upon his surety, the Petitioner, liability for Respondent's loss.

This follows from the general rule stated in 46 Corpus Juris 1069:

> "In some cases it is laid down as a general proposition that sureties on an official bond are only liable for acts of the principal done by virtue of the office, and cannot be held responsible for acts done merely by color of office. In other cases the distinction has been repudiated, and the more general rule would seem to be that for improper acts performed by an officer under color of his office, the sureties upon his bond can be held liable, although this rule is subject to the qualification that in order to constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown beside the fact that in doing the act complained of the officer claimed to be acting in an official capacity."

That rule has been adopted by the courts of Illinois and is applicable to the instant case.

In *People, for use, etc.*, v. *Brown*, 194 Ill. App. 246, the action was brought on the bond of a County Clerk. It was contended by the surety that the act of the County Clerk in issuing county warrants or orders payable to himself did not constitute an official act. The Court said (page 250):

> "We are of the opinion that any person injured by the official act of an officer is protected by such officer's bond.
>
> "The next question to be considered is: Were the acts of the County Clerk Brown in the issuing of the warrants or orders and selling of the same official acts? We do not believe that the act of negotiating and selling the warrant was an official act, but we are of the opinion that the act of issuing the warrant or order purporting to be issued by order of the board of supervisors, and the attaching of the seal to the order was an official act. *'By an official act is not meant a lawful act of the officer. * * * It means any act done by the officer in his official capacity, under color and by virtue of his office.' Turner* v. *Sisson*, 137 Mass. 191; *Horan* v. *People*, 10 Ill. App. 21; Mechem on Public Officers, sec. 284, and authorities cited in notes. *The object of requiring official bonds is to obtain indemnity against the use of an official position for wrongful acts done under color of office. People* v. *Treadway*, 17 Mich. 480; *Campbell* v. *People*, 154 Ill. 601." (Italics supplied.)

In *People for the use of Johnson* v. *Morgan*, 188 Ill. App. 250, the Court said at page 251:

> "Official acts in the performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his official capacity under color and by virtue of said office. *Campbell* v. *People*, 154 Ill. 595. The object of requiring official bonds is to obtain indemnity against the use of the office. *Greenberg* v. *People*, 225 Ill. 174. The bond of a city treasurer is governed by the above section of the statute, which includes all city and village officers, and in the case of *City of East St. Louis* v. *Flannigan*, 26 Ill. App. 449, it was held that the

> sureties of the treasurer's bond were liable to a third person damaged through the unlawful acts of the treasurer done in his official capacity by virtue of his office."

It is conceded that O'Connell held the office of Chief Security Examiner of the Industrial Commission, the body charged with the administration of the Workmen's Compensation Law, and that in all things material he purported to be acting in that capacity and in the name of the Commission. Therefore, the specific, lawful powers of his office are immaterial to a decision of this case. Petitioner is liable for acts done by O'Connell under color of his office, and that his defrauding of Respondent was so perpetrated can be found from conceded and uncontroverted facts.

(c) If such definition were a question of fact, and material, there was no genuine issue with respect thereto.

The mere existence of a question of fact, even in the presence of conflicting affidavits or documentary evidence, does not foreclose a summary judgment. The court may examine the evidence, voluminous or scant, and if it is satisfied that there is no genuine issue of fact (or, in other words, if, after a consideration of such evidence, the court would direct a verdict in favor of one or the other of the parties), the court may properly find that there is no such issue as to facts as would prevent the entry of a summary judgment. See *Heart of America Lumber Co.* v. *Belove*, 28 Fed. Supp. 619 (D. C., W. D. Mo.) and 111 Fed. (2d) 535 (CCA-8th), for an example of the aforesaid rule.

We submit that there is in this case no genuine issue as to the authority or official duties of said Chief Security Examiner. A detailed discussion of the evidence to demonstrate the correctness of that contention would be inappropriate in this brief. The Circuit Court of Appeals,

after mature consideration of all the evidence submitted by affidavit and stipulation and of the aforesaid ruling of the Illinois State Civil Service Commission, determined that under no circumstances could said Chief Security Examiner be said not to have authority to accept the deposit of security by an employer seeking to qualify as a self-insurer. Therefore, the entry of a summary judgment for Respondent is proper.

We feel that we have met and answered on the merits the contention of Petitioner that the Circuit Court of Appeals, contrary to the Rules of Civil Procedure, has decided a genuine issue as to a material fact in a summary judgment proceeding, but we feel constrained to mention that Petitioner raised that objection for the first time in this proceeding in its petition for rehearing filed with the Circuit Court of Appeals. Despite the fact that the alleged lack of authority of the Chief Security Examiner was asserted by Petitioner as one ground for the granting of its motion for summary judgment and was one of the main points of discussion in the briefs and oral arguments of both parties to the appeal, Petitioner did not point out to the District Court or the Circuit Court of Appeals the presently asserted disability of the Court to decide that point until after the Circuit Court of Appeals had rendered its opinion. Petitioner chose to speculate upon the outcome of the appeal taken by Respondent, hoping that the Circuit Court of Appeals would sustain the judgment erroneously given to Petitioner by the District Court. Having lost on that gamble, Petitioner attacked and now attacks the power of the Court to decide against it. Speculation of that character should avail Petitioner nothing.

II.

The Industrial Commission of Illinois Had and Has the Power to Accept Deposits of Security From Applicants Seeking to Become Self-Insurers.

A single reading of Section 26(a) of the Illinois Workmen's Compensation Act (Illinois Revised Statutes, 1943, Ch. 48, Par. 163), as quoted at page 19 of Petitioner's Brief, will suffice to show conclusively that the Illinois Industrial Commission has been granted the power to accept from an employer a deposit of security or to accept other indemnity or a bond in lieu of requiring the employer to insure his entire liability for compensation provided by the Act. Section 26(a) specifically states that "if the sworn [financial] statement of [the] employer does not satisfy the commission [of the employer's financial ability to pay future compensation awards] * * *, the commission shall require such employer to * * * furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in [the] Act, or * * *."

It is also apparent that the deposit of that security or the furnishing of the indemnity or bond may be made with or to the Commission itself. That conclusion flows naturally from the language used and there is no limitation of that language elsewhere in the Section or in the Act.

Petitioner has repeatedly attempted to use Rule 39 of the Illinois Industrial Commission, quoted at pages 19 and 20 of its Brief, to limit and destroy the plain meaning of Section 26 of the Act. We again submit, and will patiently demonstrate anew, that this not only is not so but cannot be so.

By the provisions of Section 26 of the Workmen's Compensation Act, (Illinois Revised Statutes, 1943, Ch. 48,

Par. 163), each employer subject to the Act is required to file with the Industrial Commission "a sworn statement showing his financial ability to pay the compensation provided for in [the] Act." If the statement filed satisfies the Commission as to his financial ability, the employer need do nothing more; he is deemed a self-insurer (Sec. 26(a) (1)). If he fails to file the required statement, or if the statement filed does not so satisfy the Commission, he must do one of two things. He may "insure his entire liability to pay such compensation in some insurance carrier * * *" (Sec. 26(a) (3)), or, if he does not wish to do that, he may, with the concurrence of the Commission,

> "Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, or (Sec. 26(a) (2)),
>
> "Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act, * * *" (Sec. 26(a) (4)).

If he so qualifies, he is also known as a self-insurer.

Rule 39 of the Commission reiterates the requirement of Section 26(a) (1) that all applicants to become self-insurers shall file a financial statement. The second sentence of that rule creates an additional requirement that no application to become a self-insurer will be entertained "unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge *all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application*" (R. 55). (Italics supplied.)

It requires only a cursory examination of the statute and the rule to ascertain that Section 26(a), as a whole, and Section 26(a) (2), in particular, relate solely to furnishing security for the payment of future awards of com-

pensation which may be made, and that the second sentence of Rule 39 relates solely to the deposit of a fund to insure the payment of accrued liability on awards of compensation already made. The language used will permit of no other construction or result. Thus, the two requirements complement each other and neither, in any way, conflicts with, or limits or modifies the other.

Petitioner no longer relies upon a direct denial of this inescapable conclusion, but seeks to toss it aside and unfairly to confuse the issues by stating, contrary to the fact, that there was no proof that Respondent's deposit of security was made to secure future awards of compensation, and, to "prove" that the deposit was made to secure accrued awards, Petitioner quotes a provision of the argument under which Respondent's deposit was made which deals with the return of the deposited security and not with the condition of the deposit (Br. 21). The evidence clearly shows that said deposit was made to secure the payment of future awards of compensation. The agreement quoted from specifically provides that the security deposited by Respondent was to be,

> "* * * held by the said Industrial Commission of Ill. as a guarantee for the payment of any judgments entered against the said Pinkerton's National Detective Agency, Inc. for the payment of any sums found by process of law to be due to the employees of the said Pinkerton's Nat'l. Det. Agency, Inc. under a law of the State of Illinois, known as the Workmen's Compensation Law, approved June 28, 1913, and in force July 1, 1913, * * *" (R. 14, 36).

And, after Respondent had elected to and did furnish a satisfactory insurance policy and requested the return of its security, the Chairman of the Commission wrote to it as follows (R. 17):

> "It is the rule of the Commission that collateral is to be held one year from the effective date of insurance policy, injured employees have the right to file claim

> for that period of time. If on May 24th, 1942, there are no claims, awards or judgments of this Commission, against the Pinkerton's National Detective Agency, your collateral will be released at that time."

Plaintiff's contention is at least erroneous.

It would serve no purpose and would unduly lengthen this brief to discuss and answer in detail the arguments advanced by Petitioner at page 22 of its brief. The whimsical character of that argument becomes readily apparent if one bears in mind that Respondent did not qualify nor seek to qualify as a self-insurer upon the mere filing of a financial statement showing ability to meet awards of compensation. Respondent qualified in accordance with Section 26(a) (2) of the Act by depositing security for the payment of future awards of compensation. In addition, the reasoning of the Circuit Court of Appeals branded by Petitioner as fallacious was used by the Court merely to give an extreme example of the results of the unsound position taken by Petitioner.

Petitioner's glancing attack on the constitutionality of Section 26(a) of the Workmen's Compensation Act is likewise without merit and immaterial. In the first place, that question was not properly presented or preserved below. Secondly, it is of no assistance in ascertaining the meaning of Section 26(a) of the Act since the argument made would militate equally against the construction contended for by the Petitioner and that contended for by Respondent. Thirdly, the statute providing for the filing of a bond by the Chief Security Examiner is not assailed and the holding of the Court in *People* v. *Federal Surety Co.*, 336 Ill. 472 is not applicable. Furthermore, if Section 26(a) were unconstitutional, under the rule announced in the *Federal Surety Co.* case, Petitioner's principal, O'Connell, and consequently, Petitioner, would be estopped to deny the validity of its bond.

III.

Statute of Limitations.

The shortest period of limitation contended for by Petitioner is five years. Even if the five year statute of limitations is held to apply, the present action is not barred.

The defalcation against which Petitioner assumed liability, as expressed in the bond which it executed, was the failure of its principal, as Chief Security Examiner for the Industrial Commission, to "account for and pay over to the parties entitled thereto, all moneys that shall come into his hands by virtue of said office or employment," and to "account to and turn over to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers and all other property appertaining to his office or employment * * *." (R. 6, 8.)

It is the failure of O'Connell to account for the money or property of Respondent that is the basis of the action brought by Respondent against Petitioner, *Selleck* v. *Selleck*, 107 Ill. 389, 395. That failure occurred at or subsequent to May 24, 1941 when Respondent procured the requisite compensation insurance and first demanded the return of its security (R. 11, 17). Not until that date did a cause of action arise or exist against the surety upon O'Connell's bond. Not until that date could any statute of limitations begin to run. This action, filed July 21, 1942, was in ample time.

CONCLUSION.

We respectfully submit that Petitioner has shown no cause for the granting of a writ of certiorari and that its petition should be denied.

GUY A. GLADSON,
DOUGLAS C. MOIR,
WILLIAM C. MULLIGAN,
Attorneys for Respondent.

WINSTON, STRAWN & SHAW,
Of Counsel.

(31)

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REPLY BRIEF OF PETITIONER.

LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

Petitioner,

against

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., A CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent has filed a brief in opposition to the petition for writ of certiorari herein. We shall reply to the arguments made in the order in which they are presented in the brief and shall designate petitioner as "Surety" and respondent as "Pinkerton", as we did in our original brief.

I.

The Circuit Court of Appeals Did Decide a Genuine Issue of Material Fact.

(a) The proceedings of the Civil Service Commission of Illinois do not make O'Connell's duties a question of law. That commission has no power to and has never purported to prescribe O'Connell's duties. (Reply to Pinkerton's Point I(a)—Pinkerton's Brief, pp. 5-6.)

At pages 11 and 12 of its original brief the surety has related the substantial material evidence contained in the record, which proves that O'Connell did not receive Pinkerton's security by virtue of his office. Pinkerton's first contention is that this is a question of law determinable from a civil service examination notice given by the Illinois Civil Service Commission in 1938. This position is vulnerable in at least three respects.

First: the Illinois Civil Service Commission is not vested with authority to prescribe duties of civil service employees. Its power (as stated in Section 3 of the Act quoted on page 5 of Pinkerton's brief—Illinois Revised Statutes, 1941, Chap. 24½, Par. 3) is to "*classify* all the offices and places of employment in the State service, * * * with reference to the duties thereof, for the purpose of establishing grades and for the purpose of fixing and maintaining standards of examinations * * *". (Italics ours.) Section 3(a) of the Civil Service Act (Illinois Revised Statutes, 1941, Chap. 24½, Par. 4) provides:

> "The commission shall *ascertain* the duties of each office and place in the classified service and designate by rule the grade of each position." (Italics ours.)

It will be noted that the word used is "ascertain", not "prescribe", the duties of the various offices. Surely, if

the Commission were empowered to prescribe duties, it would be unnecessary to "ascertain" what it had itself prescribed, and if the legislature had intended to authorize the Civil Service Commission to "prescribe" duties, the word "prescribe" would have been used instead of "ascertain".

Further, if the Civil Service Commission had purported to prescribe the duties of Chief Security Examiner, the rule or order prescribing such duties, not a mere notice of examination, would be the evidence of such prescription. The fact is that the Civil Service Commission does not have power to prescribe duties of civil service employees and it has never purported to prescribe O'Connell's duties, and the notice set forth on page 5 of Pinkerton's brief does not purport to be a prescription of duties by the Civil Service Commission. At most, it is a statement of what the Civil Service Commission assumed were the duties of Chief Security Examiner in 1938, and, at most, when properly proven, the notice of examination may be some evidence to be weighed against Angsten's positive testimony that O'Connell was not authorized to receive collateral. It is not a basis for determining, as a matter of law, that O'Connell was authorized to receive deposits of collateral.

Second: The conversion of Pinkerton's security is alleged in the complaint to have occurred "during the year 1936" (Rec. 4). The issue in this case is whether O'Connell acted by virtue of his office in receiving Pinkerton's security prior to its alleged conversion in 1936 and even if the Civil Service Commission were empowered to prescribe duties and even if it had prescribed the duties of O'Connell in 1938, such prescription of duties is not relevant in determining O'Connell's duties in 1936.

Third: There is no evidence in the record of the proceedings of the Civil Service Commission related on page 5

of Pinkerton's brief and it will be noted that Pinkerton gives no page reference in its brief. Pinkerton has never relied upon the notice of the Civil Service Commission as constituting a legal designation of O'Connell's duties and has never contended that the Civil Service Commission was empowered to or did prescribe such duties until it made that contention at page 5 of its brief filed in this court. The information in reference to the proceedings of the Civil Service Commission in 1938 appears in the case, not from the record, but from a brief filed by the Attorney General of Illinois, as *amicus curiae*, in the Circuit Court of Appeals. The Attorney General did not contend that the Civil Service Commission had power to or had prescribed O'Connell's duties. He merely contended that the notice of examination, of which he asked the Circuit Court of Appeals to take judicial notice, was *evidence* which proved incorrect the surty's contention "that the Commission did not undertake to authorize generally the deposit of securities with O'Connell."

It is elementary that the facts in reference to the notice of the civil service examination cannot be brought into this case by judicial notice. In *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 217, this court held that it could not take judicial notice of a report of a state auditor of Ohio, and in *Robinson* v. *B. & O. Ry.*, 222 U. S. 506, 511, it held the same in reference to the decisions of the Interstate Commerce Commission. In *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.*, 108 Fed. (2d) 433, 436 (C. C. A. 7) the court held that judicial notice could not be taken of the contents of a file wrapper in the Patent Office. In *Butler* v. *Illinois Traction, Inc.*, 253 Ill. App. 135, 148, the court held that judicial notice will not be taken of orders entered by the state Commerce Commission. In *People* v. *Dalton*, 61 N. Y. S. 263, the court held that judicial notice

will not be taken of the *rules and regulations of the Civil Service Commissioners* of the City of New York prescribed in accordance with the Civil Service Law.

Obviously, Pinkerton is compelled to take the position that O'Connell's duties are determinable as a matter of law because the substantial evidence that he did not act by virtue of his office entitles the surety to a jury trial unless the question may be resolved as a pure question of law. Pinkerton cannot take the position taken by the Attorney General—that the examination is *evidence* of delegation of authority by the Inrustrial Commission—because to take such position would merely emphasize that the question is one of fact and hence hinges upon conflicting evidence. To avoid the applicability of Rule 56 of the Federal Rules of Civil Procedure, Pinkerton must contend that O'Connell's duties were prescribed by law and the result is Pinkerton's feeble resort to the notice of civil service examination as constituting a legal prescription of O'Connell's duties.

Pinkerton's contention (Pinkerton's Brief, p. 9) that the surety, having speculated that the Circuit Court of Appeals would affirm the decision of the trial court that O'Connell did not act by virtue of his office, should not be permitted to have that issue determined by jury trial after adverse decision by the Circuit Court of Appeals, is merely tantamount to contending that a motion for summary judgment waives the right to trial. Rule 56 and each of the cases cited at pages 17 and 18 of the surety's original brief is authority that there must be a trial if there is a genuine issue as to material fact. If it is correct that the affidavit of Angsten does not establish incontrovertibly that O'Connell did not act by virtue of his office, to say the least, that affidavit is substantial evidence of such fact and the converse that it is incontrovertibly established

that O'Connell did act by virtue of his office does not follow.

(b) The receipt of Pinkerton's Treasury bond by O'Connell was not colore officii. (Reply to Pinkerton's Point 1(b)—Pinkerton's Brief, pp. 6-8.)

Pinkerton next argues that a precise delineation of O'Connell's duties is immaterial because in any event he accepted the deposit of Pinkerton's Treasury bond under color of his office. What is the fact that gives the color? Pinkerton says it is the fact "that O'Connell held the office of Chief Security Examiner of the Industrial Commission, the body charged with the administration of the Workmen's Compensation Law, and that in all things material he purported to be acting in that capacity and in the name of the Commission." (Pinkerton's Brief, p. 8.)

The quotation from Corpus Juris relied upon by Pinkerton (Pinkerton's Brief, p. 6—46 C. J. 1069) is specific authority that "something else must be shown beside the fact that in doing the act complained of the officer *claimed to be acting in an official capacity.*" (Italics ours.) The fact which furnishes the color necessary to make an act *colore officii* must be a specific power to do the act complained of under some circumstances.

Each of the cases cited by Pinkerton (Pinkerton's Brief, pp. 7-8) indicates that for an act to be *colore officii* there must be authority to do the act under some conditions, and if there is no power or authority to do the act in any circumstance the act is not *colore officii*, notwithstanding the fact that it is done by an office holder who purports to act officially. Thus, in *People, for use, etc.*, v. *Brown*, 194 Ill. App. 246, (Pinkerton's Brief, p. 7) the county clerk was authorized to issue county warrants for proper purposes.

He was not authorized to issue warrants to himself without consideration, but such issuance of warrants was held to be *colore officii*. The underlying fact which supplied the color was the fact that the clerk was authorized to issue warrants under some conditions. That case clearly indicates that in the absence of authority to do the act complained of under some conditions the doing of the act will not be *colore officii*. In that case the clerk not only issued the warrants, but negotiated them. He was not empowered to negotiate warrants under any circumstances, and his act of negotiation was held to be a private, as distinguished from an official, act, and to be not *colore officii*. (p. 250 of the opinion.) The court also recognized that the surety was not liable for damages flowing from the negotiation of the warrants, and the principal issue decided by the case is that the damages resulted from the issuance of the warrants, which was held to be an act done under color of the clerk's office.

The necessity of the existence of authority to do the act complained of under *some* circumstances in order to make the act *colore officii*, is well stated in *Taylor* v. *Albert Shields*, 183 Ky. 669, (210 S. W. 168, 3 A. L. R. 1619), where the question was whether the act of a police officer in arresting without a warrant was *colore officii*. The statute did not authorize the officer to make arrests in any circumstances in the absence of a warrant, and the court held that the arrest was not *colore officii*, quoting with approval, at page 674:

> "To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes

> the act to be done without process, then there is no such color of office as will enable him to impose a liabilitity upon the sureties in his official bond."

In the case at bar it cannot be said that O'Connell received Pinkerton's deposit of collateral *colore officii* in the absence of authority vested in O'Connell to receive deposits of collateral in some instances. Angsten says he had no such authority. (Rec. 43-44.) Whether O'Connell possessed such authority is a question of material fact upon which there is a genuine issue, and Pinkerton is only attempting to lift itself by its boot straps when it contends that O'Connell's act was *colore officii*, thereby rendering an exact delineation of his duties immaterial, because it is first necessary to ascertain his duties before it can be determined whether he acted *colore officii* in accepting Pinkerton's deposit.

(c) There is a genuine issue of fact as to the authority delegated to O'Connell by the Industrial Commission. (Reply to Pinkerton's Point 1(c)—Pinkerton's Brief, p. 8.)

Pinkerton confines its discussion of the evidence under it contention that there is such little conflict in the evidence as to warrant a court in directing a verdict to the statement: "a detailed discussion of the evidence to demonstrate the correctness of that contention would be inappropriate in this brief." (Pinkerton's Brief, p. 8.)

At pages 11-12 of our original brief, we related the substance of the affidavit of Peter J. Angsten, Chairman of the Illinois Industrial Commission during the time involved in this case. Since O'Connell's duties were not prescribed by law and are to be determined solely from delegations of power by the Industrial Commission, the

scope of his authority is to be determined primarily by considering such delegations of power by the Industrial Commission. Such consideration involves purely matters of fact. Angsten's affidavit is specific and definite that "The duty of said Lawrence J. O'Connell as chief examiner of securities of the said Commission during his employment as aforesaid was only to examine the financial statements of employers who applied to the Commission for self insurance, and that if such statements were not satisfactory to the Commission, to inform such employer thereof and also to inform him of the amount of securities such employer should deposit in the name of a qualified trustee in a qualified bank or trust company of the employer's own selection. Affiant further says that neither this affiant nor any other members of the Commission, to his knowledge, ever knew of the existence of the said supposed agreement between plaintiff and the Commission * * *. That said supposed agreement, if it was executed as alleged by plaintiff, was executed by the said Lawrence J. O'Connell without the authority, approval, direction or knowledge of the said Commission, or this affiant as Chairman thereof, and outside the duties of his said employment." (Record, pp. 43-44.)

Certainly this affidavit furnishes competent material evidence which is more than a scintilla that O'Connell was not authorized to accept the deposits of collateral and it cannot be passed off with the mere statement that a discussion in the brief is inappropriate.

Heart of America Lumber Co. v. *Belove*, 28 Fed. Supp. 619, 111 Fed. 2d, 535 (Pinkertons' Brief, p. 8) furnishes no justification for the Circuit Court of Appeals deciding the controverted issue of facts and no support for Pinkerton's argument. In that case a tenant sued a landlord for failure to rebuild a building destroyed by fire under the pro-

visions of the lease whereby the landlord agreed to repair within a reasonable time if the premises were rendered uninhabitable by fire. The affidavit of the defendant was to the effect that the walls of the building were destroyed and rendered useless by the fire. The affidavit of the plaintiff was that the walls remained standing. But the affidavits of both parties show that the roof and all floors had caved in. The court examined the applicable state law and ascertained that under a covenant to repair there was no duty on the landloard to rebuild and under the applicable state law the mere fact that the walls remained standing did not make it a repair job as distinguished from rebuilding. Thus the issue as to whether the walls remained standing was not material since, taking the facts on the plaintiff's affidavit, under the state law the work required amounted to rebuilding as distinguished from repairing. There is no statement in the decision that the court has a right to determine material issues of fact on summary judgment proceedings.

II.

The Industrial Commission Lacked Power to Act as Depository of Collateral From Self-Insurers, and for This Additional Reason O'Connel's Receipt of Pinkerton's Collateral Was Not by Virtue of His Office. (Reply to Pinkerton's Point II, Pinkerton's Brief, pp. 10-13.)

We have fully stated our position in reference to the authority of the Industrial Commission itself to act as a depository of collateral from self-insurers at pages 19-24 of our original brief. We recognize that there is no existing decision of a reviewing court of Illinois inconsistent with the decision of the Circuit Court of Appeals on this subject, and we also recognize that this court would not ordinarily grant the writ of certiorari to review this portion

of the Circuit Court of Appeals' decision. We do, however, hope that this court will grant the writ to review the other errors assigned, which come squarely within the examples specified by this court in its Rule 38 of circumstances when this court will exercise its discretion to review the action of Circuit Courts of Appeals by Writ of Certiorari; and we hope that if, prior to the time this court has made its decision, the Illinois Supreme Court does decide the question as to the power of the Industrial Commission itself to act as depository adversely to the decision of the Circuit Court of Appeals, this court will then also correct the action of the Circuit Court of Appeals in that respect.

But, while the action of the Circuit Court of Appeals on this one question would not ordinarily cause this court to grant the writ of certiorari, the mere fact that that question will not be reviewed does not determine the case. If the Industrial Commission lacked power, as we contend, to act as depository, of course the result would be that the surety is entitled to prevail without consideration of the other questions; but the fact that the Industrial Commission had power to act as depository does not entitle Pinkerton to prevail. In order for Pinkerton to prevail, it is also necessary that O'Connell acted by virtue of his office in accepting Pinkerton's deposit, and the fact that the Commission might have such power in no manner establishes that O'Connell was authorized to exercise that power of the Commission.

III.

Pinkerton's Action Is Barred by the Illinois Five Year Statute of Limitations. (Reply to Pinkerton's Point III, Pinkerton's Brief, p. 14.)

Pinkerton no longer takes issue with the surety's contention that the five year statute of limitations is applicable to its claim. Its sole justification for the refusal of the

Circuit Court of Appeals to apply the said statute is now its contention that the cause of action accrued on or after May 24, 1941, within the five year period when Pinkerton demanded the Commission to return the treasury bond.

Selleck v. *Selleck*, 107 Ill. 389 (Pinkerton's Brief, p. 14), is a case where possession of the Cook County bonds and subsequent proceeds of sale involved was obtained rightfully and under an agreement between the defendant and the plaintiff's privy to return on demand. Pinkerton persists in confusing the liability, if any, and relationship between Pinkerton and the Industrial Commission and the liability and relationship of O'Connell and Pinkerton. Even if the escrow agreement (Rec. 14, 15) is a binding contract between Pinkerton and the Industrial Commission, it is not and does not purport to be a contract between O'Connell and Pinkerton. If Pinkerton were suing the Industrial Commission for the failure to return its security, *Selleck* v. *Selleck*, 107 Ill. 389, would be applicable insofar as the statute of limitations is concerned if the escrow agreement is a valid contract of the Industrial Commission. In the case at bar, O'Connell did one wrongful act which created a liability against him. That act was the conversion of Pinkerton's bond specifically alleged to have occurred in 1936 (Rec. 4). Any cause of action which ever accrued to Pinkerton against O'Connell or his surety accrued by reason of that conversion. There is no contract between Pinkerton and O'Connell upon which to predicate the accrual of a second cause of action. *O'Connell* v. *Chicago Park District*, 376 Ill. 550 (cited in our original brief at page 28), is specific authority that where possession is wrongfully obtained the cause of action accrues at the time of obtaining of possession and that that is the only cause of action that arises out of the transaction. Even if the Industrial Commission had rightful possession of Pinkerton's security under the escrow agreement, O'Con-

nell never had the right to personal possession because the security, according to Pinkerton, was not deposited with O'Connell personally and there is no contract between Pinkerton and O'Connell personally. Consequently, the moment O'Connell took personal possession of the security in 1936 the cause, and the only cause which ever arose against him, accrued. Since Pinkerton no longer contests the applicability of the five year statute of limitations, it follows that the cause of action is barred by lapse of time under that statute.

Conclusion.

Pinkerton cannot make and has not made a convincing argument that there is not a genuine issue of material fact as to whether O'Connell acted by virtue of his office or that the cause is not barred by the Illinois five year statute of limitations. The defenses made are not technical. Pinkerton had no right to impose upon the surety responsibility for a loss sustained through dealings with O'Connell beyond the scope of his duties. The Circuit Court of Appeals decided material issues of fact in summary judgment proceedings in violation of Rule 56 of the Federal rules of Civil Procedure and in conflict with the decisions of the other Circuit Courts of Appeals, and the existing situation falls clearly within that type of cases which this court by its Rule 38 cites as examples when it may exercise its discretion to grant the writ of certiorari.

It is respectfully prayed that the said writ be granted and that this court review and correct the errors committed by the Circuit Court of Appeals.

LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.